Blending National Autonomy into the EU Charter. A Reply to Leonard F.M. Besselink

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Irrespective of who said precisely what in Copenhagen, my vision of the structural shifts in the interaction of national constitutions and the EU Charter differs respectfully from the position put forward by Leonard Besselink. I do not agree that national human rights are being ignored and that the constitutive power has shifted to the European Union. It seems to me that the situation is not quite as dramatic and I will suggest, to the contrary, that the ECJ is moving in the right direction. My objection concerns three aspects: the *Melloni* judgment, Leonard's counterfactual hypothesis and the ECJ's function as a supreme court. While the first objection is rather technical, the remainder highlights the potential of national autonomy in the application of the Charter.

The Outcome of the *Melloni* Judgment

I concur with Leonard Besselink that the Grand Chamber did not leave much leeway for national human rights in *Melloni*, thereby effectively obliging the Spanish *Tribunal Constitucional* to abandon its interpretation of Article 24 of the Spanish Constitution. In contrast to Leonard, I would not blame the ECJ for this outcome. In February 2009, the Council decided unanimously to adopt Framework Decision 2009/299/JHA, which laid down in detail the conditions (including limits), in which trials in absentia may justify surrender requests under the European Arrest Warrant.

In such instances of full harmonisation, there is no room for national human rights (assuming that supranational legal principles can be extended to third pillar instruments). To allow for a different solution would have laid the axe to the roots of *Costa / ENEL* and the corresponding claim of EU law supremacy. German constitutional doctrine, with which many readers will be familiar, would qualify the 2009 Framework Decision as a *Solange II*-style situation, in which national human rights apply no longer. Full harmonisation has blocked recourse to national constitutional guarantees ever since the 1960s – and the ECJ is right, in my view, to extend this finding to Article 53 of the Charter.

To be sure, the abdication of national constitutions in situations of full harmonisation entrusts the ECJ with the responsibility to ensure human rights protection – and I readily admit that I feel uncomfortable with the idea of trials in absentia. That being said, I can live with the ECJ's conclusion that the Framework Decision strikes a balance and does not, therefore, violate Articles 47 and 48(2) of the Charter (see *Melloni*, paras 47-54). However, that is not Leonard's primary objection. He wants more room for Member States, especially in areas of national discretion.

A Counterfactual Hypothesis – and Beyond

It is enjoyable intellectual gymnastics to base your argument on a counterfactual hypothesis – and to ask whether 'Member States are prohibited to apply national standards … when they have discretion'. I support this approach, but disagree with the conclusion that 'it is by the grace of the Court of Justice that Member States can apply their constitutions to their discretionary action'. Luxembourg is even said to have become the 'ultimate arbiter of the scope of national constitutions', thus extending the ECJ's powers beyond the interpretation of EU law – possibly even shifting the constitutive power 'from the Member State to the European Union impersonated

by the Court of Justice'.

I applaud Leonard's courage to present a forceful argument, even if I disagree in substance. To be sure, the developments Leonard takes issue with are (together with the implications of the financial crisis) the most pertinent controversy in EU constitutional law at this moment. The stakes are high and a settlement has not been found yet. But I cannot subscribe to his dramatic appeal. It seems to me that the drastic findings, quoted above, wrongly equate national *discretion* (in the application of EU rules) with the abstract scope of national constitutions (including in situations where no EU rules exist).

It may be worth recalling that neither *Melloni* nor *Åkerberg Fransson*, which were both promulgated on the same day, claimed that the ECJ was responsible for adjudicating in areas beyond the scope of EU law. Without a component of Union law, the EU Charter would not apply and the ECJ will declare inadmissible preliminary references (various rulings in recent months demonstrate that this is no abstract theory: see, by way of example, C-106/13, C-264/12, C-206/13 and C-265/13).

Melloni did not fall into this category and neither do other judgments, which are covered by the – admittedly vague – rule in Article 51(1) of the Charter that it applies to Member States 'only when they are implementing Union law.' We may discuss the reach of this provision and one can argue that the ECJ went too far in *Åkerberg Fransson* (as the *Bundesverfassungsgericht* claimed in his *ultra vires* warning). Yet, that is something else than to claim in abstract terms and without recourse to written rules in the EU Treaties that the constitutive power has shifted. After all, the ECJ interprets a provision, which national parliaments ratified. It would have been naïve to assume that a legally binding Charter of Fundamental Rights would have no constitutional impact.

A Supreme Court – no Human Rights Court

That leaves us with what I perceive of as the core query: How to accommodate national self-determination and the Charter? I have argued elsewhere that there are two models how this objective can be achieved: some advocate a 'separation thesis', which aims to protect national autonomy by means of a strict demarcation of the scope of the Charter and national constitutions – while others espouse a 'fusion thesis', which blends national sensitivities into the application of the Charter. It is my understanding of *Melloni* that the ECJ moved towards the second position by promising Member States breathing space for country-specific solutions under the umbrella of the Charter.

Leonard Besselink rightly highlights an important caveat of the *Melloni* judgment, if the Court retains control over the degree of national deviation, which may affect neither the level of protection guaranteed by the Charter nor the effectiveness of Union law. The degree of value pluralism, which the fusion thesis brings about, depends on how the Court handles this caveat. That is where the self-description as a 'supreme court' takes centre stage (or 'primary court', if we take up Leonard's reminder of the semantic distinction between *primacía* and *supremacía*, which the Spanish *Tribunal Constitucional* brought forward in its 2004 declaration on the Constitutional Treaty).

As a 'supreme court', the ECJ rightly focuses on the interpretation and application of Union law as a whole – not only on the hot topics of constitutional interpretation. In line with this function, it is the everyday practice of judges in Luxembourg to resolve intricate technical matters of company law, environmental regulation, asylum procedure, tax issues or competition law. Given that supranational law remains inherently fragile, the ECJ has to uphold, as the 'Supreme Court' of the Union, the uniformity and effectiveness of EU law in all these diverse fields. That leaves few capacities to engage into the micromanagement of human rights adjudication at the fringes of European law.

Against this background, the self-description as a 'supreme court' should be understood as a reassurance for national courts that Luxembourg will refrain from in-depth interventions in human rights questions in areas where Union law is loosely knit. The Charter may apply, but the Court will limit itself to basic principles, which will often reiterate ECtHR case law. The absence of a human rights complaint by individuals supports this outcome procedurally. Doing so, may guarantee that the 'fusion thesis' works in practice, leaving Member States room for country-specific solutions. That is no classic vision of national sovereignty, but today's equivalent of democratic self-determination in a supranational legal environment: national singularities and the Charter are synthesised.

A study by Daniel Thym on how national autonomy can be accommodated with the Charter on the basis of the Melloni and Åkerberg Fransson cases *has appeared in EuConst 9 (2013), 391-419, also to be found here.*

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